

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DICK L. POFF

Claimant

VS.

IBP, INC.

Self-Insured Respondent

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Docket No. 270,756

ORDER

Claimant requested review of the August 22, 2003 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on January 20, 2004.

APPEARANCES

Scott L. Johnson of Topeka, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant filed four separate workers compensation claims alleging work-related injuries on four separate dates to four different parts of his body.¹ Although all four claims were heard at one regular hearing, the Administrative Law Judge (ALJ) conducted the hearing so that all the evidence pertaining to one claim was heard and terminal dates were established before the hearing proceeded with the evidence pertaining to the next claim. The ALJ then issued four separate awards.

¹ Docket No. 233,909 alleging bilateral carpal tunnel syndrome; Docket No. 247,591 alleging varicose veins in both lower extremities; Docket No. 250,093 alleging injuries to the back, hands and fingers; and, Docket No. 270,756 alleging hearing loss in both ears.

In this docketed claim, the claimant alleged work-related hearing loss in both ears. The ALJ found the claimant failed to provide timely notice that he suffered a hearing loss and therefore claimant's benefits were denied.

The claimant argues that he gave timely notice of hearing loss when he requested a hearing test just before he quit working for respondent. And that because there was no accident report filed he had a year to file written claim. Claimant further argues that the ALJ erred in separating each claim and instead should have considered the cumulative effect of the injuries he suffered in all four claims, which claimant argues would result in a finding that he is permanently and totally disabled.

Respondent argues the claimant failed to meet his burden of proof that he met with personal injury arising out of and in the course of his employment; the claimant failed to give timely notice; and the claimant failed to make a timely written claim. Consequently, the respondent requests the Board affirm the ALJ's finding denying claimant benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant argues that the cumulative effect of the four separate injuries should have been considered and only one award entered. The Board disagrees.

Each of the alleged accidents resulted in separate and distinct injuries unrelated to the others. Nor was it alleged that the injury in a claim was the natural, direct or probable consequence of another claim. At the regular hearing on November 15, 2002, the ALJ told the parties that each claim was for a separate injury and all the evidence pertaining to each individual claim would be taken before the evidence pertaining to the next claim would be taken. The ALJ noted:

Okay. Now, as a matter of procedure, we're going to go down docket by docket and we'll need to address each issue and each docket as we go through. When you are through with the evidence in one docket, we'll close that record and then we will proceed to the next docket. These are all apparently separate or alleged separate injuries, so we'll need to address each issue individually as we go through each docket individually as we go through. Is that clear?²

No objection was made to this procedure nor was there any request to consolidate the claims for entry of a single award. The Board finds that each claim must be determined on its own merits separate from the other filed claims.

² R.H. Trans. at 9-10.

The Board finds the ALJ's Award should be affirmed. The Board agrees with the ALJ's analysis of the evidence as set forth in the Award. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

The dispositive issue is whether the claimant gave timely notice of his alleged work-related hearing loss. The Workers Compensation Act requires a worker to provide the employer timely notice of a work-related accident or injury. The Act reads:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.³

The claimant alleges that his conversation with the plant nurse, when he requested that his hearing be tested a few days before he quit working for respondent on June 29, 2000, provided notice of his claimed hearing loss. But the claimant admitted that he simply told the nurse that he wanted a record of his hearing level at the time he left work. The ALJ concluded that the conversation never conveyed the required specific information that claimant was alleging a workplace injury. The Board agrees and affirms the ALJ's finding that claimant failed to provide timely notice.

Moreover, claimant also failed to make a timely written claim. By letter to respondent dated May 15, 2001, claimant alleged several work-related injuries including a claim for hearing loss suffered through claimant's last day worked on June 29, 2000.

K.S.A. 44-520a (Furse 1993) requires written claim for compensation be served upon the employer within 200 days after the accident date. Service of the written claim on respondent on May 15, 2001, with an accident date of June 29, 2000 is more than 200 days. And the time for filing would not be extended to a year pursuant to K.S.A. 44-557 (Furse 1993) because claimant never missed work because of the alleged hearing loss and consequently, respondent was not required to file an accident report.

³ K.S.A. 44-520 (Furse 1993).

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated August 22, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott L. Johnson, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director